OCT 4 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.
No. 343

BARBARA KARRELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOHN W. PRESTON,
712 Rowan Building, Los Angeles 13,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Statutes involved 2

Statement of the case 2

Specification of errors 5

The questions involved 6

Reasons relied on for allowance of the writ 6

Summary of argument 7

Argument 8

I.

The penal provisions of the World War Veterans' Act of 1924 are not validly incorporated in the Servicemen's Readjustment Act of 1944, hence no penalty is provided for the acts charged in the indictment 8

II.

If, however, it be assumed that the penal provisions of the World War Veterans' Act are validly incorporated in the Servicemen's Readjustment Act, such penal provisions do not apply to the acts charged in the indictment and, hence, do not constitute offenses against the United States 10

III.

There is no substantial evidence, or, indeed, any evidence at all, to support the verdict and judgment below 13

PAGE

IV.

The District Court, was without jurisdiction or power to require petitioner, as a condition of probation, to make so-called restitution to veteran-purchasers of lots, because there is no evidence in the record to show that such veterans suffered any actual damages or loss by reason of the offenses for which conviction was had..... 17

Appendix:

Pertinent provisions of World War Veterans' Act of 1924 and of the Servicemen's Readjustment Act of 1944, as amended (38 U. S. C. A.).....App. p. 1

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Donnelly v. United States, 276 U. S. 505	9
Fasulo v. United States, 272 U. S. 620	9
Lanzetta v. New Jersey, 306 U. S. 451	9
United States v. Arnold, 115 F. 2d 523	9
United States v. Resnick, 299 U. S. 207	9
Young v. United States, 178 F. 2d 78	12

Statutes

United States Code Annotated, Title 18, Sec. 3561	17
United States Code Annotated, Title 18, Sec. 3651	17
United States Code Annotated, Title 28, Sec. 1291	2
United States Code Annotated, Title 28, Sec. 1294	2
United States Code Annotated, Title 38, Sec. 694	2, 5
United States Code Annotated, Title 38, Sec. 694a	2, 5
United States Code Annotated, Title 38, Sec. 697	2, 5, 7, 8
United States Code Annotated, Title 38, Sec. 701	11
United States Code Annotated, Title 38, Sec. 706	11
United States Code Annotated, Title 38, Sec. 710	11
United States Code Annotated, Title 38, Sec. 712	8, 10
United States Code Annotated, Title 38, Sec. 713	8, 11
United States Code Annotated, Title 38, Sec. 714	8, 11
United States Code Annotated, Title 38, Sec. 715	2, 5, 7, 8, 10, 11, 12

Textbooks

22 Corpus Juris Secundum, Sec. 17, pp. 66-67	9

IN THE

Supreme Court of the United States

October Term, 1950.
No. .....

BARBARA KARRELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Barbara Karrell, defendant and appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on the 24th day of April, 1950. A rehearing was denied by that Court on the 8th day of September, 1950, and the judgment of said Court is final.

Opinions Below.

The United States Court of Appeals for the Ninth Circuit rendered one opinion in the case [R. 682] which is reported in 181 F. 2d 981.

Jurisdiction.

The Court of Appeals for the Ninth Circuit had jurisdiction under Title 28, U. S. C. A., Section 1291.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1294.

Statutes Involved.

The statutes involved are the World War Veterans' Act of 1924, as amended, and the Servicemen's Readjustment Act of 1944, as amended, Title 38, U. S. C. A., Sections 694, 694a, 697 and 715. The pertinent portions of said statutes are contained in the Appendix hereto.

Statement of the Case.

The petitioner, defendant and appellant below, was indicted in the District Court of the United States for the Southern District of California, Central Division, on seventeen counts [R. 2-19], each count charging an offense identical with the others except as to the names of the veterans, dates of the alleged offenses, and the descriptions and values of the properties involved. Count Four of the Indictment is illustrative of all of said seventeen counts, and reads as follows:

> "On or about October 22, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Barbara Karrell did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C., Sections 694 *et seq.*), in that defendant

did cause the Bank of America, National Trust and Savings Association, 1358 Third Street, Santa Monica, California Branch, to certify in a Home Loan Report presented to the United States Veterans Administration that the price paid by Philip Bentivegna, a veteran of World War II, for the purchase of a residential lot at 4907 Beloit Avenue, Los Angeles, California, as to which a loan guarantee was sought from the Government of the United States, was $1,550.00 and that the price paid by said veteran for such property did not exceed the reasonable value thereof of $1,650.00, as determined by proper appraisal dated July 24, 1946, made by Robert E. Gilliland, an appraiser designated by the Administrator of Veterans' Affairs; whereas as defendant well knew and caused to be concealed from said bank and Veterans Administration, the total price demanded and received by the defendant from said veteran for such property was $2,150.00 and did exceed the reasonable value thereof as determined by a proper appraisal."

Petitioner was convicted on Counts Two, Four, Five, Six, Nine, Eleven, Twelve, and Fourteen [R. 22-23]. On motion for judgment of acquittal, the District Court acquitted the petitioner on Counts Two and Five, but denied said motion as to Counts Four, Six, Nine, Eleven, Twelve, and Fourteen [R. 26-27].

The District Court entered judgment as follows: (1) That petitioner-defendant is guilty as charged in Counts Four, Six, Nine, Eleven, Twelve, and Fourteen; (2) that

she be imprisoned for one year on each of said six counts, and pay a fine of $1,000.00 for the offense stated in each such count; (3) that she be imprisoned until said fines are paid; (4) that the several periods of imprisonment run concurrently; (5) that the several sentences imposed be suspended and that defendant be placed on probation for five years, provided that she make restitution to the several veterans named in all of the seventeen counts of the indictment, and to one other person not so named, of the overpayments alleged to have been made by them to her for building lots aggregating $7,300.00 and that she pay a fine of $2,700.00 to the United States of America at such times and in such amounts as should be directed by the Probation Officer [R. 27-31].

From said judgment the petitioner appealed to the United States Court of Appeals for the Ninth Circuit [R. 32-33]. The Court of Appeals affirmed the judgment of the District Court in all respects, except that said Court ordered that the cause be remanded to the District Court

> "with instructions to amend the probation order by limiting the restitution to the veteran named in each of the six counts of the indictment as to which appellant stands convicted and by limiting such damages to the difference between the appraised value of the several lots and the actual sales price paid therefor" [R. 692].

Specification of Errors.

1. The Court below erred in holding that the penal provisions of the World War Veterans' Act of 1924, Title 38, U. S. C. A., Section 715, are incorporated in the Servicemen's Readjustment Act of 1944, Title 38, U. S. C. A., Sections 694, 694a, 697.

2. The Court below erred in holding that the penal provisions of the World War Veterans' Act of 1924 apply to, or make unlawful, the acts charged in the indictment in this case.

3. The Court below erred in holding that the acts charged in the indictment constitute an offense against the United States of America.

4. The Court below erred in holding that the District Court had jurisdiction to try and enter judgment against the petitioner for the offenses charged in the indictment.

5. The Court below erred in holding that there was any substantial evidence, or any evidence at all, to sustain the allegations of the indictment, or to support the verdict and judgment.

6. The Court below erred in holding, as a condition of probation, that petitioner make restitution to the six veterans named in Counts Four, Six, Nine, Eleven, Twelve and Fourteen of the indictment, since there is no evidence whatever in the record that said six veterans suffered any actual loss or damage that was caused by the offenses for which the conviction was had.

The Questions Involved.

The questions involved are those suggested in the Specification of Errors.

Reasons Relied on for Allowance of the Writ.

The writ of certiorari herein prayed for should be allowed by this Court for the following reasons:

1. The Court below has decided an important question of federal law, *i. e.*, that the penal provisions of the World War Veterans' Act of 1924 are incorporated in the Servicemen's Readjustment Act of 1944, contrary to the express provisions of said acts and to applicable decisions of this Court.

2. The Court below has decided an important question of federal law, *i. e.*, that the penal provisions of the World War Veterans' Act of 1924 are incorporated in the Servicemen's Readjustment Act of 1944, which has not been, but should be, decided by this Court.

3. Even if it be assumed that the penal provisions of the World War Veterans' Act of 1924 are incorporated in the Servicemen's Readjustment Act of 1944, the Court below has erroneously decided that the acts charged in the indictment are in violation of the penal provisions of said World War Veterans' Act of 1924.

4. There is no substantial evidence, or any evidence at all, to support the verdict and judgment below.

5. The Court below has erroneously decided that a defendant convicted of a federal offense may lawfully be required, as a condition of probation, to make so-called restitution to a person not shown by the evidence to have sustained any loss or damage by reason of the offense charged.

Summary of Argument.

The Court of Appeals erroneously held that the penal provisions of the World War Veterans' Act of 1924 (Title 38, U. S. C. A., Sec. 715) are validly incorporated, by reference, in the Servicemen's Readjustment Act of 1944 (Title 38, U. S. C. A., Sec. 697).

Said Acts of Congress do not prohibit or make unlawful the acts charged in the indictment against the petitioner, and the acts so charged do not constitute an offense against the United States.

The conviction herein rests solely upon alleged concealment by petitioner from the Bank of the true prices paid by veterans for lots sold them. There is not a word of evidence showing such concealment; on the contrary, the evidence shows, without contradiction, that the Bank had in its files, at the date of each Home Loan Report made to the Veterans Administration, written documents showing (a) the actual and true price paid for the lot and (b) the appraisal value thereof by a Government appraiser.

The district court was without jurisdiction and power to require petitioner, as a condition of probation, to pay sums of money to veterans, as so-called restitution, when the record fails to show that such veterans sustained any loss or damage by reason of the several offenses charged in the indictment.

ARGUMENT.

I.

The Penal Provisions of the World War Veterans' Act of 1924 Are Not Validly Incorporated in the Servicemen's Readjustment Act of 1944, Hence No Penalty Is Provided for the Acts Charged in the Indictment.

The Government has contended throughout this case that the acts charged against petitioner are unlawful because, it says, the penal provisions of the World War Veterans' Act of 1924 as amended (38 U. S. C. A., Secs. 712, 713, 714 and 715) are validly incorporated in the Servicemen's Readjustment Act of 1944 (38 U. S. C. A., Sec. 697). The Government relies upon Section 697 of Title U. S. C. A. which provides in this connection:

> "(a) Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-3, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, *shall be for application under this chapter.*" (Italics ours.)

The phrase "shall be for application under this chapter" is not only vague and uncertain, but it is meaningless. So far as careful research discloses, the phrase is not to be found in any other statutes, or in any reported decisions prior to the enactment of Section 697, *supra*. It is a maverick. The phrase does not meet the requirements of law laid down in many decisions that "There are no con-

structive offenses; and, before an accused can be punished, his act must *plainly* be within the statute." *Fasulo v. United States,* 272 U. S. 620, 629. (Italics ours.)

It is well settled that no act can be punished as an offense against the United States unless it is prohibited and made punishable by an Act of Congress; and the federal courts cannot by construction make that a crime which is not so prohibited. (*Langetta v. New Jersey,* 306 U. S. 451; *United States v. Resnick,* 299 U. S. 207; *Donnelly v. United States,* 276 U. S. 505; *Fasulo v. United States,* 272 U. S. 620, *supra; United States v. Arnold,* 115 F. 2d 523; 22 Corpus Juris Secundum 66, 67, Sec. 17 of Criminal Law.)

The acts charged in the indictment are: that the petitioner, by *concealing* from the Bank of America the true prices paid by veterans for lots purchased from petitioner, thereby caused the Bank to make false certificates and papers to the Veterans Administration. Such acts of concealment are nowhere prohibited or made punishable in the World War Veterans' Act of 1924 or in the Servicemen's Readjustment Act of 1944; such acts are not even mentioned in either of said Acts of Congress. The Government and Courts may not read into these Acts something that is not "plainly within the statute." ***Fasulo v. United States, supra.***

II.

If, However, It Be Assumed That the Penal Provisions of the World War Veterans' Act Are Validly Incorporated in the Servicemen's Readjustment Act, Such Penal Provisions Do Not Apply to the Acts Charged in the Indictment and, Hence, Do Not Constitute Offenses Against the United States.

What are the penal provisions of the World War Veterans' Act? They are found in Sections 712, 713, 714, and 715 of Title 38 U. S. C. A. and are now noted.

Section 712 of said Title 38 makes any sworn false statement perjury, where it is made and filed to support a claim for benefits such as pensions, medical, hospital and retired officers pay benefits. Section 713 creates a punishable offense for accepting payment of a pension when the right thereto has ceased. Section 714 creates a punishable offense for receiving a pension when the recipient is not entitled thereto. Certainly, the penal provisions of these sections have no application to the acts charged in the indictment in this case. The Government must, therefore, rely upon Section 715 to sustain petitioner's conviction.

Section 715 of Title 38 U. S. C. A. provides:

> "Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty

> of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

The acts made punishable by Section 715, *supra,* do not include the acts charged against petitioner in the indictment in this case. The acts made punishable by Section 715 are limited to the following: making or causing to be made false statements in an application for a pension (Title 38 U. S. C. A. Section 701), or for domiciliary care or hospital treatment (*id.* Section 706), or for emergency officers' retired disability pay (*id.* Section 710), or for receiving a pension the right to which has ceased (*id.* Section 713), or for receiving a pension without being entitled thereto (*id.* Section 714). The act of concealing the true price paid by a veteran for a building lot, and thereby causing a lender to make a false statement to the Veterans Administration, is not made unlawful or punishable by Section 715, or any other section, of the World War Veterans' Act of 1924 or by the Servicemen's Reaadjustment Act of 1944; such an act could not be unlawful, since it is not mentioned in either of said Acts.

Moreover, Section 715 and other sections referred to therein, apply only to a veteran, or other person, entitled to benefits under the Act of 1924, and not to third persons. This is clearly shown by the language used in Section 715, as follows:

> "Any person who shall knowingly make or cause to be made * * * a false or fraudulent * * * certificate (or) statement * * * concerning any claim for benefits under (specified sections of the Act of 1924) * * * shall *forfeit* all rights, claims, and benefits under said sections, *and, in addition* to any

> and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished * * *." (Italics ours.)

It is thus manifest that only a veteran, or some member of his family, who is entitled to a pension or to some other benefit under the Act of 1924 could "forfeit his rights and claims" thereto; and it is equally manifest that only such veteran, or member of his family, entitled to such benefits and who has forfeited them could be included in the statutory language "and, *in addition* * * * shall be guilty of a misdemeanor * * *." In the quaint language of petitioner's trial counsel: "you can't add onto something you do not have. You could not get that additional penalty on if you did not have some right to forfeit" [R. 394]. This is but another way of saying that the language of Section 715, *supra,* does not apply to a person who is not entitled to some right under the Act of 1924.

The Court of Appeals relies on its own decision in *Young v. United States,* 178 F. 2d 78, to sustain its holding herein that the penal provisions of the Act of 1924 are incorporated by reference in the Act of 1944. (181 F. 2d 980, at page 984.) This Court denied certiorari in the *Young* case, *supra,* 70 S. Ct. 573, without assigning a reason for such denial. It is respectfully submitted that the question whether the penal provisions of the Act of 1924 are validly incorporated in the Act of 1944 should be definitely settled by the decision of this Court.

III.

There Is No Substantial Evidence, or, Indeed, Any Evidence at All, to Support the Verdict and Judgment Below.

The indictment charges that petitioner caused the Bank of America to make false certificates or statements to the Veterans Administration concerning the prices paid by veterans for lots purchased by them; and it charges that the method used by petitioner to cause the Bank to make false statements was by *concealing* from the Bank the true prices paid to her for said lots. Concealment is, therefore, the vital essence of the offenses charged.

There is not one word of evidence in the record that shows, or even tends to show, that the petitioner concealed from the Bank of America the actual and true prices paid to petitioner for the lots in question. On the contrary, *the record shows that the true prices paid for these lots were fully disclosed to the Bank by written escrow instructions deposited with the Bank in each sale of a lot to the veterans involved prior to the making of the alleged false statements by the Bank to the Veterans Administration.* The record thus shows that the true prices paid for the lots were not, and could not have been, concealed from the Bank and the trial court so stated. [See colloquy between Court and Government counsel, R. 412-413.] The evidence of the two officers of the Bank, who testified for the Government, shows that the escrow instructions in each and every instance disclosed the true amount paid to petitioner by each veteran [R. 311-337]. The evidence of petitioner,

elicited by Government counsel, shows that "the first escrow instruction (in each sale) always stated the precise and exact and true amount which was paid for the lot" [R. 500]. There was no evidence at all to the contrary. Indeed, under pressure of the trial judge Government counsel admitted that the Bank knowingly made the false certificates or statements to the Veterans Administration [R. 418], since it had or was charged with knowledge of the true prices paid for lots as shown by the escrow instructions deposited with the Bank. Even the Court of Appeals admitted that the Bank had such knowledge, saying (181 F. 2d at page 986):

> "It is true that information furnished the Bank through both (of its) branches constituted a full statement of the facts (relative to lot prices)."

It is thus manifest that petitioner did not conceal and that she could not have concealed from the Bank the true prices paid to her for the lots in question. The Bank had documentary evidence in its files of the true price paid for each such lot at the time it made its Home Loan Report to the Veterans Administration.

Moreover, the Bank had in its files, before making each such Home Loan Report, the report of the Government appraiser showing the appraisal value of each lot sold, as well as the true price paid by each veteran for his lot. The following table, compiled from Exhibits 11-A, 13-A, 15-A, 16-A, 17-A, and 18-A, on file herein, conclusively establishes knowledge by the Bank of prices paid for lots

and appraisal values thereof at the dates of the several Home Loan Reports to the Veterans Administration:

Count of Indictment	Name of Veteran	Date of Escrow	Date of Appraisal Report	Date of Report to V.A.	Exhibit No.
4	Philip Bentivegna	7-20-46	7-24-46	8-17-46	11-A
6	David Wilder	7-12-46	7-23-46	8-12-46	13-A
9	Fritz Kornfeld	6-17-46	7-11-46	8-12-46	15-A
11	John L. Chamberlain	6-25-46	7-10-46	8- 8-46	16-A
12	David Bruce Register	6- 5-46	7- 3-46	9-11-46	17-A
14	Louis Martin Higgins	5-19-46	5-29-46	7- 2-46	18-A

The record shows, in this connection, that the petitioner never had, at any time prior to the finding of the indictment, any knowledge whatever concerning the appraisal value of the lots. She testified, and there is no evidence to the contrary [R. 467]:

> "Q. Did you thereafter at any time receive any information as to the appraised value of the lot based on the appraisal made by an appraiser designated by the Veterans Administration? A. The first time I knew the appraisal was when I received the indictment.
>
> Q. That is after the indictment had been returned against you? A. That is true."

In respect to this testimony, the Court below said:

> "It is of no particular importance that the appellant did not know exactly what the appraisal would be. She was no doubt acquainted with values of the property she was dealing in and knew something of its appraisal value. Whether she estimated the appraisal

> value accurately or not does not affect the result. She desired a false report to go from the lending bank to the Government officials who passed upon the loans and in some manner procured the bank to cooperate in her scheme to accomplish this end." (181 F. 2d 986.)

The Court's conclusions rest upon mere assumption, without evidentiary support. The Court assumed that although petitioner "did not know exactly what the appraisal would be" she knew something thereof, notwithstanding she had testified without contradiction that she never knew the appraisals until after the indictment was returned. The Court then attempts to justify its unfounded assumptions by saying "she desired a false report" to be made, and "in some manner (not disclosed) procured the bank to cooperate in her scheme to accomplish this end."

The conviction in this case is a travesty on justice. There is no substantial evidence to support it; and it should be reversed.

IV.

The District Court Was Without Jurisdiction or Power to Require Petitioner, as a Condition of Probation, to Make So-called Restitution to Veteran-Purchasers of Lots, Because There Is No Evidence in the Record to Show That Such Veterans Suffered Any Actual Damages or Loss by Reason of the Offenses for Which Conviction Was Had.

The judgment of the trial court ordered that petitioner be placed on probation for five years, and that, as a condition thereof, she make restitution of sums aggregating $7,300.00 representing the difference between the prices paid for lots and the appraised values thereof. The Court of Appeals ordered that restitution aggregating $3,300.00 apply only to the veterans named in the six counts for which conviction was had, and ordered that the judgment of the district court be amended accordingly and, as thus amended, affirmed.

There is not one word of evidence in the record that shows that the six veterans involved in the judgment, or any or either of them, suffered or sustained any "actual damages or loss caused by the offense(s) for which conviction was had." (18 U. S. C. A., Sec. 3561.) In the total absence of evidence showing "actual damages or loss," the district court was without jurisdiction or power to adjudge, as a condition of probation, that petitioner make so-called restitution.

Section 3651 of Title 18, U. S. C. A. (new Criminal Code) provides in this connection that probation may be granted to a defendant convicted of any offense against

the United States not punishable by death or life imprisonment. The section further provides:

> "While on probation and among the conditions thereof, the defendant—
>
> May be required to pay a fine in one or several sums; and
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *."

It is thus made plain that, before the Court may order restitution as a condition of probation, the evidence must show that the aggrieved party has suffered *actual* damages or loss by reason of the offense for which conviction was had. There is no such showing in the record herein. The Court below stated (181 F. 2d 987):

> "But restitution in the sense the word is used here means giving back the sum paid by the veteran over and above the value of the thing he got. The value of the thing he got is the sum it was appraised at. Therefore, the sum which can be ordered restored to the veteran as restitution is the difference between the appraised value and the actual purchase price."

The appraised value mentioned by the Court was the amount fixed by one appraiser for the purpose of guaranteeing a loan. Such appraised value has no necessary relation to the actual or market value of the property, and it may not be so assumed. To determine whether any veteran involved suffered actual damages or loss certainly required more evidence of property values than an appraisal for loan purposes. It may well be that actual, or sale, values at the time of sentence greatly exceeded the appraised values at the time the loans were guaranteed. The

Court had no ground for assuming, as it did, that appraised value for loan purposes represented the actual or market value of the property.

Wherefore, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, to the end that the errors aforesaid may be corrected by this Court.

Respectfully submitted,

JOHN W. PRESTON,
Counsel for Petitioner.